Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and Subsidiaries, Debtors-in-possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, *et al*.	)	MB Docket No. 05-192

REPLY COMMENTS OF TIME WARNER CABLE INC.

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INTRODUCTION AND SUMMARY

As Time Warner Cable Inc. ("TWC") explained in its opening comments, the *per se* ban on exclusive contracts between cable operators and their affiliated satellite-delivered programmers impermissibly burdens cable operators' First Amendment rights.[1] The record confirms that the robust and growing competition among multichannel video programming distributors ("MVPDs") has undermined any legal justification for extending the ban.[2] Several commenters, including various MVPDs, argue that cable operators retain economic incentives to withhold vertically integrated programming from competitors, and the Media Bureau has issued

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1 Comments of Time Warner Cable Inc., *Revision of the Commission's Program Access Rules et al.*, MB Docket Nos. 12-68, 07-18, 05-192 (filed June 22, 2012).

2 *See* Comcast Comments at 9-12; Cablevision Comments at 2-6; Nat'l Cable & Telecomm. Ass'n Comments at 3-14; Discovery Communications Comments at 2-4, 6-8; Madison Square Garden Co. Comments at 6-13.

requests for data that presumably are expected to help the Commission evaluate such incentives, including where clustering of cable systems is alleged to increase the profitability of a withholding strategy. But those arguments are largely beside the point, as the absence of any remaining bottleneck in the video distribution marketplace deprives the Commission of any legitimate basis for mandating access to particular programming.

Indeed, the requisite governmental interest in perpetuating restrictions on vertically integrated cable operators' ability to speak and to function as editors does not turn on predictions about the marginal effects of cable system clustering or marginal changes in the incentives of cable operators to enter into exclusive arrangements. Rather, the underlying premise of the exclusivity ban was to protect the public from harms arising from the bottleneck monopoly power that Congress identified and sought to remedy in 1992. Absent the bottleneck conditions that formed that essential justification for the exclusivity ban, the First Amendment prohibits the Commission from continuing the ban *at all*, regardless of what it concludes about the particular economic incentives of MVPDs in distribution arrangements. The First Amendment simply does not permit the Commission to restrict cable operators' speech based on generalized predictions about whether certain business practices might, in the Commission's judgment, create more or less robust speech in particular (often highly complex) circumstances. As both courts and this Commission have recognized, and as the record in this proceeding confirms, the bottleneck conditions that formed the factual premise underlying this particular restriction on speech no longer exist. That should be the end of the matter.

The analysis that the Commission performed in its 2007 Report and Order regarding cable operators' economic incentives[3]—which the Commission seems intent on replicating in this proceeding—glosses over this critical bottleneck inquiry, apparently *presuming* that cable operators possess market power without adducing contemporaneous record evidence. But as the Commission appropriately recognized in the recent *Viewability Sunset Order*, it cannot justify burdening cable operators' speech rights in the absence of substantial evidence documenting the continuing need for such burdens (even apart from the obligation to ensure that any restrictions are narrowly tailored, in contrast to the categorical ban at issue).[4] Therefore, whatever the extent of cable operators' incentives to enter into exclusive contracts, the Commission must establish that a bottleneck exists (at a minimum) before seeking to regulate program access in any respect. By failing to examine that more fundamental issue (let alone to demonstrate a bottleneck), the NPRM, the Media Bureau's data requests, and the comments supporting an extension of the exclusivity ban all fall far short of meeting the minimum constitutional requirements necessary to limit cable operators' speech.

In all events, there plainly is no justification for singling out cable operators for continued prohibitions on exclusive distribution arrangements. If the purported harm that the exclusivity ban aims to prevent is the restriction of certain programming to a single MVPD, that interest cannot serve as a basis to apply the restriction uniquely to cable operators. To the contrary, as

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3 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 et al.*, Report and Order and Notice of Proposed Rulemaking, MB Docket Nos. 07-29, 07-198 (rel. Oct. 1, 2007) ("2007 Report and Order").

4 *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Fifth Report and Order, FCC 12-59, ¶ 11 (rel. June 12, 2012) ("*Viewability Sunset Order*") (recognizing that "the dramatic changes in technology and the marketplace over the past five years render less certain the constitutional foundation" for requiring carriage signals in analog format, and finding insufficient current evidence to support ongoing preservation of the rule).

TWC has argued and some other MVPDs agree, the "must have" nature of programming should determine the extent to which the Commission regulates access to it, assuming such regulation is permissible at all. In particular, allowing a non-cable MVPD to tie up extremely popular programming (as DIRECTV has done with its NFL Sunday Ticket offering) while barring a cable operator from distributing *any* vertically integrated programming on an exclusive basis is indefensible. The selective regulation of exclusivity amounts to a naked speaker-based preference that is presumptively unconstitutional,[5] and the unjustified differentiation among video distributors' business practices violates the Administrative Procedure Act as well.[6]

The Commission therefore should allow the exclusivity ban to sunset. Any continuation of the ban, whether on a market-by-market or service-by-service basis, would violate the First Amendment and would fail to satisfy the Commission's obligation to ensure that the ban remains "necessary" under Section 628(c)(5).[7] Such partial sunsets also would be unworkable as a practical matter, as even proponents of continued regulation appear to recognize.

DISCUSSION

I. THE EMERGENCE OF VIBRANT COMPETITION UNDERMINES THE GOVERNMENT'S INTEREST IN RESTRICTING CABLE OPERATORS' SPEECH RIGHTS

A. Absent Demonstration of a Bottleneck, the Government Lacks a Sufficient Justification To Extend the Exclusivity Ban

Cable operators and cable-affiliated video programmers are speakers and editors.[8] The exclusivity ban directly implicates the speech rights of these speakers.[9] This is so both because

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5 *See, e.g.*, *Citizens United v. Fed. Elec. Comm'n*, 130 S. Ct. 876, 898 (2010).

6 *See* Comcast Comments at 19-20; Cox Communications Comments at 3.

7 47 U.S.C. § 548(c)(5).

8 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

the ability to enter into exclusive arrangements can encourage development of new programming (*i.e.*, more speech), and because the prohibition requires programmers to have their programming carried by MVPDs with whom they would prefer not to deal, which violates the long-standing First Amendment "presum[ption] that speakers, not the government, know best what they want to say and how to say it."[10] And because the exclusivity ban applies only to cable operators, the ban discriminates based on the speaker's identity and favors some speakers over others.

As the NPRM acknowledges, Congress's justification for enacting the exclusivity ban in Section 628 was the concern that cable operators had "bottleneck" control in video programming distribution, such that "vertically integrated cable programmers … may simply refuse to sell to potential competitors" of their cable operator affiliates.[11] Critically, the statutory restrictions on cable operators' speech rights have been upheld (if at all) *only* because of the "bottleneck monopoly power exercised by cable operators."[12]

The record in this proceeding fails to establish any continuing bottleneck, and that failure deprives the Government of any legitimate interest in banning exclusivity. Far from demonstrating the existence of a bottleneck, the comments confirm what the D.C. Circuit found several years ago: that none remains.[13] Cable operators now face more competition than ever

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9 *See Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 979 (D.C. Cir. 1996); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1316 (D.C. Cir. 2010) (Kavanaugh, J., dissenting).

10 *Riley v. Nat'l Fed. of the Blind, Inc.*, 487 U.S. 781, 790-91 (1988).

11 S. Rep. No. 102-92 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1152, 1159 ("Senate Report"); *Revision of the Commission's Program Access Rules et al.*, MB Docket Nos. 12-68, 07-18, 05-192, Notice of Proposed Rulemaking, FCC 12-30 ¶ 6 (rel. Mar. 20, 2012) ("NPRM").

12 *Turner*, 512 U.S. at 661; *Time Warner*, 93 F.3d at 978.

13 *See* Time Warner Cable Comments at 5-10; Comcast Comments at 9-12; Cablevision Comments at 4-5; Nat'l Cable & Telecomm. Ass'n Comments at 3-14; *Comcast Corp. v.*

from satellite, telco, and Internet-based distributors, while vertical integration between cable operators and programmers has decreased substantially. The Department of Justice concluded in 2008 that "the most significant development" regarding multichannel video programming distribution in recent years has been the launch of facilities based service "by the principal local telephone companies."[14] The Commission has found that cable's share among MVPDs has fallen steadily, from 78 percent in 2002 to under 58 percent today.[15] At the same time, the percentage of satellite-delivered national programming networks affiliated with cable operators also has experienced a precipitous drop, from 53 percent in 1994 to 14 percent today.[16] In light of these developments, the Commission recently concluded that the "dramatic changes in technology and the marketplace" no longer justified its viewability mandate.[17] Here, the extensive competition among MVPDs similarly undercuts the fundamental premise of the exclusivity ban.

DIRECTV argues that, because the Commission previously extended the exclusivity ban (based on an entirely different and now-stale record), it is prohibited from allowing the ban to sunset "absent dramatic new evidence in the record."[18] That claim is entirely backwards. The First Amendment and the statutory text each require the Commission to affirmatively justify an extension of the exclusivity ban based on substantial evidence. Because an extension of the ban

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FCC, 579 F.3d 1, 8 (D.C. Cir. 2009) ([c]able operators … no longer have the bottleneck power over programming that concerned the Congress in 1992").

14 U.S. Department of Justice, *Voice, Video And Broadband: The Changing Competitive Landscape And Its Impact On Consumers*, at 6 (Nov. 2008), *available at* http://www.usdoj.gov/atr/public/reports/239284.pdf.

15 *See* NPRM App. A; Nat'l Cable & Telecomm. Ass'n Comments at 9.

16 *See* NPRM App. B; TWC Comments at 8.

17 *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Fifth Report and Order, FCC 12-59 ¶ 11 (rel. June 12, 201).

18 DIRECTV Comments at 12-13.

would "impose[] current burdens," there is a heavy burden on Government to demonstrate why the restriction is "justified by current needs," not, as DIRECTV would have it, a heavy burden on speakers to establish why they should be permitted to speak.[19] Moreover, Section 628(c)(5) independently provides that the Commission must determine whether the ban is still "necessary,"[20] and the Administrative Procedure Act compels the Commission to support any such finding with substantial evidence.[21] Consistent with these First Amendment and statutory obligations, the Commission recognized that it was required to sunset the analogous viewability mandate absent a substantial evidentiary showing that it remained necessary and burdened cable operators' speech no more than necessary.[22]

B. The Commission Cannot Justify Extending the Exclusivity Ban Based on an Assessment of Economic Incentives

Commenters seeking to extend the exclusivity ban attempt to sidestep the requisite showing of a bottleneck, focusing instead on cable operators' asserted incentives to withhold vertically integrated programming from competitors. The Media Bureau's data requests, drawing on the analysis it performed in 2007, likewise seek to determine whether cable operators have the "ability and incentive to favor their affiliated cable operators over nonaffiliated competitive MVPDs."[23] The Commission in 2007 undertook an analysis of whether, among

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19 *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009); *see also Comcast Corp. v. FCC*, 579 F.3d 1, 9-10 (D.C. Cir. 2009) (vacating speech restrictions in light of a "changed marketplace" because the restrictions "would continue to burdens speech protected by the First Amendment").

20 47 U.S.C. § 548(c)(5).

21 5 U.S.C. § 706(2)(E).

22 *Viewability Sunset Order* ¶ 11.

23 2007 Report and Order ¶ 29.

other issues, clustering of cable systems might increase the profitability of entering into exclusive arrangements, and it seems poised to perform the same analysis here.[24]

But that narrow focus on the profitability of different business strategies misses the point of the requisite constitutional inquiry. The Government's interest in maintaining program access restrictions has never turned on the marginal impact that clustering or other factors have on cable operators' economic incentives to engage in exclusive distribution; rather, those speech restrictions hinge on the assertion of a bottleneck arising from the presumed absence of competing video distributors. That bottleneck was a necessary foundation for Congress's enactment of the restrictions at issue, as well as for the court decisions upholding those restrictions.[25] In the absence of bottleneck power, the Commission's legal justification for perpetuating these speech restrictions disappears, and no regression analysis considering various other factors affecting the supposed financial incentives to engage in exclusive distribution can satisfy the First Amendment's heavy presumption against speech restrictions. To the contrary, such regulation would amount a naked preference for particular entities' speech.[26]

After all, every company that pursues an exclusive distribution model does so in the belief that whatever sales it foregoes will be outweighed by increased profitability. No rational actor would choose exclusivity otherwise. For example, when the New York Times gives subscribers exclusive access to its news stories or its columnists' op-eds rather than making such content available to other news outlets, or when Apple chooses to launch the iPhone through an exclusive arrangement with AT&T, those companies make those judgments based on their own

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[24] 2007 Report and Order ¶¶ 57, 59.

[25] *See* Senate Report, 1992 U.S.C.C.A.N. at 1152, 1159; *Turner*, 512 U.S. at 661; *Time Warner*, 93 F.3d at 978.

[26] *Citizens United*, 130 S. Ct. at 898.

assessment of their economic self-interest. Absent a showing of a bottleneck, cable operators' similar pursuit of product differentiation and profitability should not be a matter of public concern. As TWC has explained, there will be many instances where cable operators will choose the broadest possible distribution of vertically integrated content on competing MVPD platforms, as TWC has announced it will do in connection with its forthcoming Lakers RSNs,[27] whereas in other circumstances, exclusive distribution arrangements might be preferable.[28] Just as other communications and media companies routinely make those judgments for themselves, so too must cable operators be permitted to do so.

The Commission not only lacks a sufficient constitutional basis to second-guess such judgments in the absence of a demonstrated bottleneck, but it is ill-equipped to do so. The incentives arising from the clustering of cable systems and related factors identified in the Commission's 2007 economic analysis are only a few of the many considerations that affect whether a particular exclusive distribution arrangement makes economic sense in particular circumstances for a programmer and an MVPD. For example, clustering alone might or might not increase cable operators' incentives to enter into exclusive arrangements, and those increased incentives might or might not be outweighed by myriad other factors. All of these incentives and

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27 *See* News Release, Time Warner Cable and Los Angeles Lakers Sign Long-Term Agreement for Lakers Games, Beginning With 2012-2013 Season," available at: http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-newsArticle&ID=1528805&highlight= (Feb. 14, 2011) (announcing that the networks "will be available to all satellite, cable and telco distributors in the Lakers' territory").

28 *See, e.g., Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 51 n.200 (2010) ("*2010 Program Access Order*") (explaining that "exclusivity plays an important role in the growth and viability of local cable news networks" and that "permitting such exclusivity should not dissuade new MVPDs from developing their own competing regional programming services") (internal quotation marks, citations, and alterations omitted).

business tradeoffs are simply natural components of the fact-specific marketplace analysis that each business must conduct in each particular circumstance. The Commission is in no position to pre-judge the competitive process through overly simplistic assumptions, particularly when these incentive tradeoffs and business judgments are inherently benign.[29]

The record also confirms the validity of TWC's argument that geographically specific, market-by-market analyses would not be workable in this context, even apart from the constitutional impediments to any extension of the exclusivity ban. While DIRECTV and TWC disagree on the continuing need and justification for the ban, both companies agree that a market-by-market sunset would be inconsistent with the realities of how MVPDs acquire programming, typically on a nationwide basis.[30] Those pragmatic concerns underscore the appropriateness of sunsetting the exclusivity ban completely, rather than partially. Under Section 628, the Commission will continue to have the authority to evaluate allegations of unfair or deceptive practices on a case-by-case basis, and that is the best mechanism for it to address any competitive issues that arise from exclusive distribution arrangements.

II. AT A MINIMUM, THE COMMISSION MUST REFRAIN FROM SINGLING OUT CABLE PROVIDERS IN REGULATING EXCLUSIVE DISTRIBUTION ARRANGEMENTS

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29 Indeed, absent the bottleneck monopoly power that actually justified the exclusivity ban, it is not clear what the Commission would hope to accomplish with its regression analysis. Courts repeatedly have held that "exclusive distributor arrangements are presumptively legal." *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods.*, 129 F.3d 240, 245 (2d Cir. 1997). As one court put it, "there is a veritable avalanche of precedent to the effect that, absent evidence of monopolization, a manufacturer may legally grant … an exclusive franchise." *GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976) (*en banc*), *aff'd*, 433 U.S. 36 (1977). *See also 2010 Program Access Order* ¶ 51 n. 200 (recognizing that "exclusivity plays an important role in the growth and viability of local cable news networks").

30 *See* DIRECTV Comments at 35.

If the Commission does not sunset the exclusivity ban altogether, it must modify the rules to eliminate the unjustified targeting of cable operators' speech. It is a fundamental First Amendment precept that, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another."[31] Applying the exclusivity ban only to cable operators does precisely that, and in today's robustly competitive environment, the ban simply puts a thumb on the scale in favor of certain programming distributors. As Cablevision notes, newer types of MVPDs can distribute and market their own exclusive content to secure competitive advantage in a manner that would be unlawful if undertaken by cable operators.[32] Particularly in the absence of a bottleneck, it is impermissible for the Government to permit DIRECTV to distribute its popular NFL Sunday Ticket package on an exclusive basis while barring any form of exclusivity by vertically integrated cable operators.

DISH Network appears to agree that any continuing program access regulation should not focus on cable operators' vertical integration in isolation, but rather should address "the popularity of the affiliated programming with the relevant consumer audience."[33] Indeed, as Discovery Communications notes, the Commission's myopic focus on cable operators' vertically integrated programming has led it to ignore more serious competitive issues relating to broadcasters' bundling of must-have network programming with programming services that distributors would prefer not to carry.[34] The Commission's categorical exclusion of other types of exclusivity from its regulatory scheme—regardless of the actual competitive effects at issue—underscores the irrationality of the existing approach and requires correction if any form of

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31 *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

32 Cablevision Comments at 5, 9.

33 DISH Network Comments at 5.

34 Discovery Communications Comments at 2-3.

exclusivity regulation is to survive. Otherwise, the inevitable result will be to subject cable operators to significant marketplace disadvantages while distorting competition more generally. Even if such selective regulation were permissible under the First Amendment and the APA, and it is not, it would be profoundly unwise as a policy matter.

CONCLUSION

For the foregoing reasons, and for the reasons stated by TWC in its opening comments, the Commission should allow the ban on exclusive contracts involving satellite-delivered, cable–affiliated programming to sunset in its entirety.

Respectfully submitted,

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